In the Supreme Court of the United States

JOSEPH J. MARTIN, ALFRED M. FULLER and THOMAS B. SCHRIVER, Copartners, trading as MARTIN, FULLER & COMPANY,

Petitioners,

v.

THE STEAMSHIP "SOUTHWARK,"

Respondent.

In the matter of the petition of the said Martin, et al., for a writ of certiorari to issue to the Circuit Court of Appeals for the Third Circuit, in the above entitled action.

BRIEF ON BEHALF OF THE RESPONDENT, THE STEAMSHIP "SOUTHWARK."

The petition for a writ of *certiorari* is not based upon averments that important questions of law novel in character have been decided by the Lower Court, but asserts that certain decisions alleged to have been made by the Lower Courts are opposed to the uniform decisions of this Court. It is submitted that an examination of the opinions filed in the District Court and in the Circuit Court of Appeals will show that the decisions are not as stated in the petition; that the whole question of liability was practically one of fact and as such decided; and that it was not necessary to settle legal principles other than those found in the elementary treatises of law.

The suit was brought to recover damages for injury caused by the high temperature of a refrigerating compartment on the S. S. "Southwark," to meat shipped under a bill of lading containing the clause that the carrier should not be responsible "for breakdowns or injury however caused either to its refrigerator or to its machinery," and also a clause exempting for loss caused by "putrefaction." Although no formal findings of fact were filed by the Courts below, the essential facts are sufficiently found.

I.

1. The learned Judge of the District Court found as a fact that the carrier *had exercised due diligence in supplying refrigerating machinery of approved pattern, efficient for the purpose for which it was used, and which had always worked satisfactorily.*

> "The vessel was fitted with a refrigerating compartment known as the commercial box and with refrigerating machinery of an approved pattern. * * * The refrigerating machinery had been in use for several years and had always worked satisfactorily." (Record, p. 209.)

2. *That there had been due diligence in inspecting the refrigerating machinery before sailing.*

> "Shortly before the voyage in question it had been inspected by a competent official, and was apparently in good order." (Record, p. 209.)

3. That the two successive accidents to the machinery *after sailing,* the first occurring two or three hours after leaving port and the second the following day, were the sufficient causes of the raising of the temperature of the commercial box or refrigerator, and of the damage to the meat.

"Within two or three hours after leaving port, however, a joint was found to be leaking and it was necessary to stop the machinery in part so that the needful repair could be made. This was finished on July 5th, and the machinery was again started.

"On the same day a more serious breakdown occurred, and upon examination it was found that certain bolts and rods in the compression pump were broken and bent, and the piston was cracked. Later the crank shaft also was discovered to be bent, and not until July 8th was the machinery again in full operation.

"Its efficiency in reducing the temperature of the commercial box had, of course, been either suspended or impaired during the breakdown, and even after the repairs had been completed the temperature was not sufficiently lowered until the last day of the voyage." (Record, p. 209.)

4. That the damage to the meat being due to the breaking down of the machinery *after the voyage had begun*, and not to an improper temperature or condition *existing prior to sailing*, the exemption from liability of "breakdown or injury however caused, either to its refrigerator or its machinery" applied and the burden of proof was placed upon libellants and petitioners, to prove negligence which they had failed to do:

"The burden of proof is, therefore, not upon the carrier, but upon the shipper; and there must be sufficient evidence of the carrier's negligence before the shipper can be allowed to recover. Much of the testimony is directed to this point, and I have given it careful attention, but without being able to take the libellants' view. No doubt the machinery, for some reason or reasons, did not do its work, and no doubt, also, its failure to reduce the temperature sufficiently was due to the several breakdowns, but I cannot discover sufficient evidence to satisfy my mind that the vessel was to blame for the accidents.

> Unless negligence is proved the cause or causes of the accidents are not important; for the libellants' express contract relieved the carrier from liability for the consequences of any breakdown, however caused." (Record, p. 211.)

The only question of law therefore decided by the District Court was, that the exempting clause as to damage caused by breakdown occurring *after the voyage began and not due to a condition existing prior to sailing, where there had been due diligence in providing a proper machine duly inspected* shifted the burden of proof upon the shipper to prove negligence on the part of the carrier. *This was the sole legal question involved.*

II.

The Court of Appeals, after full argument, affirmed the decision of the District Court:

1. On the ground that the Lower Court had not failed to consider the argument of the appellants, and petitioners, that from the early breaking down of the machinery, it must be inferred that it was not in good condition at the time of sailing, DALLAS, J., saying

> "The Court below did say that the machinery supplied by the appellee failed to reduce the temperature sufficiently; that this was due to the several breakdowns, and that the vessel was not to blame for it; but it also referred to and rejected the argument that the machinery could not have been in good condition at the beginning of the voyage because the breakdown occurred so soon after the vessel set sail."
>
> "It is evident therefore that the position which the appellants now take was considered and was decided to be untenable, **because the rotting of the meat in question was not due to any condition of temperature or of machinery which existed when it was received or at the time of sailing, but to the breakdowns which sub-**

sequently happened, and that the occurrence of these accidents so soon after the vessel had sailed, did not relieve the shippers (appellants) from the burden of proving the carriers (appellees') negligence. In so dealing with the case the learned judge did not overlook but manifestly disposed of the libellants' contention." (Record, p.)

2. The Court of Appeals upon its own independent investigation then proceeded to find the facts as found by the District Court.

> "Our independent examination of the record has led us to the conclusion that he (the district judge) disposed of it correctly. His opinion, which may be found in 104 Fed., 103, sufficiently states the facts and rightly rules the law."

III.

We have, therefore, the concurrent findings of two lower Courts that the machinery *was of approved type, had been properly inspected and the loss was not due to its condition prior to or at the time of sailing,* but to break-downs occurring *after* sailing to which the exemptive clause of the bill of lading properly applied. These findings of fact, will not be disturbed.

Morewood *v.* Enequist, 23 How., 495.
The Marcellus, 1 Black, 417.
The Hypodame, 6 Wall., 223.
The Richmond, 104 U. S., 543.
Act of April 16, 1875, C. 77.

IV.

The legal questions elaborately presented in the petition for certiorari and brief do not arise in this case.

1. It is said that the decision of the Courts below permits the dressed meat clause to wipe out all warranty

of the initial fitness or seaworthiness of the ship and refrigerating machinery.

2. That the decision takes no account of the requirement of the Harter Act that due diligence to properly equip, man and provision the vessel shall be exercised by the owner, the burden of showing which rests upon the owner.

The Lower Courts did not so decide. As already shown, their decision was that where a ship owner has been duly diligent in preparing and furnishing an efficient refrigerating machine duly inspected before sailing, and in the words of Judge Dallas as a matter of fact "the *rotting of the meat in question was not due to any condition of temperature or of machinery which existed when it was received, or at the time of sailing, but to the breakdowns which subsequently happened*," the dressed meat clause threw the burden of proving negligence as a cause of the break downs upon the shipper. Further it was decided (again in the words of Judge Dallas) "the occurrence of these accidents so soon after the vessel had sailed did not relieve the shippers from the burden."

Therefore, all questions of "seaworthiness" and of "due diligence" under the Harter Act, were settled *as matters of fact* in favor of the ship, and no legal questions such as those discussed by the petitioners can now be raised, and it is unnecessary for us either to admit or deny the positions contended for. It may be noted, however, that The "Prussia" 93 Fed. 837, does not hold, as stated in the petitioners' brief, that the owner warrants the refrigerating machinery to preserve a cargo of meat throughout the voyage, but only that it is sufficient and efficient at the time of sailing, as the Lower Courts have found was the case here. The case of the "Maori King," 2 Q. B. 550, (1895) was one of express warranty of the machinery *throughout the voyage.*

Nor of course do the important questions peculiar to the business of transporting meat or gold or other special cargo, pointed out in petitioners' brief, arise here; the only legal question is the familiar one whether *admitting seaworthiness and due diligence*, the special contract in this case threw the burden of proving negligence upon the petitioners. This question is fully settled by the decisions of this and other courts.

V.

As to the question of inspection of the machinery prior to sailing this is a matter of fact decided by the concurrent decisions of two Lower Courts which will not ordinarily be disturbed.

We may note however, that the evidence set forth in the petition and brief for certiorari was *not* the only evidence upon this subject; the particular inspection as to which the witness McKernan is quoted in the brief was *his last* inspection, but not the only one. He tells (Record, p. 145) that he inspected the machinery on the day of arrival at Philadelphia, and on the subsequent day when it had cooled down, and it is hard to see what more could be required in the case of an ordinary working piece of machinery which has done and continues to do its work well. Moreover, the ship's engineers, (Record, p. 182, 184) found the machinery was working properly and cooling the box down just prior to sailing, and testified that *it had had the usual overhaul*, and that nothing was left undone to put and keep the machinery in good working order and condition prior to sailing. It is neither customary nor proper to take a piece of machinery to pieces in the absence of any evidence of weakness or trouble. On all the evidence on this point, the findings of the Lower Courts should settle the question.

VI.

The only question of law raised by the record is whether the exemptive clause is valid, as to breakdowns *occurring after sailing, and not due to a condition existing prior to or at the time of sailing, where there has been due diligence to properly equip etc.*, and if valid whether the burden of proof is transferred from the carrier to shipper to prove negligence.

That this is a familiar rule of law and presents no difficulty or novelty appears by the citation of approved text books and by the decisions of this and other Courts.

1. The rule may thus be stated: Where it appears in an action against a carrier for injury to goods shipped under a special contract, exempting the carrier from liability for damages, caused by certain perils and accidents, that the damage in question was caused by an excepted peril or accident, the shipper must affirmatively show that such damage was due to the carrier's negligence.

Hutchinson on Carriers, Section 767:

> "On the other hand it is said that when the carrier has shown that loss was occasioned by any of the causes against liability for the consequences of which he is protected by law or his contract, it will not be presumed that his negligence in any degree contributed to the loss, but that, on the contrary, negligence being in itself a positive wrong, the presumption, in the absence of proof to establish it, will be that the carrier has done his duty, and that consequently, when it has been shown that the loss resulted from any of such causes, under circumstances which do not show negligence, the burden of proving such negligence devolves upon the plaintiff."

Carver on Carriers, Section 78:

"But if a loss apparently falls within an exception the burden of showing that the ship owner is not entitled to the benefit of the exception on the ground of negligence is upon the person so contending."

In Transporation Co. *v.* Downer, 11 Wall. 129, this Court held (Syllabus) that when a defendant carrier

"shows that a loss of goods, which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant rests with the plaintiff."

In Farnham *v.* R. R., 55 Pa., 59, THOMPSON, J., said:

"By a contract limiting liability he (the carrier) is an insurer by agreement, and according to its terms. If there be a loss the agreement furnishes the extent of liability, and is confined to that unless he can show that the loss occurred from the wilfulness or negligence of the carrier."

And he adds:

"By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee."

See also York Co. *v.* R. R., 3 Wall., 107.
Colton *v.* R. R., 67 Pa., 211.
Wilson *v.* the R. R., 97 N. Y., 87.

2. The rule applies *a fortiori* to the present case where the special contract concerns the creating and maintaining of an artificial and unaccustomed atmosphere in the hold of the ship and where under the ordinary exceptions of the bill of lading there was also a stipulation that the carrier should not be responsible for damage caused by "putrefaction."

This was decided in the *Prussia,* 93 Fed., 837, Circuit Court of Appeals, Second Circuit, per WALLACE, D. J., where a similar clause was construed and it was HELD that the parties to a bill of lading for the shipment of dressed beef might properly modify the obligations which would otherwise devolve upon the carrier, including even that of providing a seaworthy vessel, short of any modification exempting the carrier from the consequences of his own or his servants' negligence. It was further held that the dressed beef clause was not in violation of the Harter Act.

In the District Court, in the same case, THOMAS, D. J. (88 Fed., 531), said:

> "If the damage proceeds from any intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight, unless the masters and owners are in fault." * * * (Citing many cases.)

> "It may very well be that whatever has a tendency to be injured by heat or by cold should be assigned to a place, in the distribution of the cargo, where its disposition would not be excited; but this would not require the carrier to create an artificial climate adapted to the preservation of goods, and to warrant that the heat or cold thus furnished should be unvarying and efficient. Such

an obligation upon a common carrier never existed, and there is no judicial suggestion as to its propriety."

It was further found that the case of the *Maori King*, 2 Q. B., 550 (1895), relied upon by the shipper was decided upon the finding that the bill of lading there contained an express warranty, that the refrigerating machinery would preserve the goods, *throughout the voyage*.

VII.

The petition and brief set forth various averments of fact which are not admitted but denied, and are also contrary to the findings of the lower Courts as we understand them. A discussion of these questions of fact is unnecessary. It is sufficient to say that among these disputed questions it should be noted:

1. The various figures given in the petition and brief as to temperature of the brine and atmosphere in the meat compartment are not sustained by the testimony even of all of the petitioners' witnesses.

2. The temperature was *not* 42 degrees at the time of sailing, as alleged in the petition; this temperature appearing on the log-book on the date of sailing being the *average* of four observations taken on that day, two prior to and two *subsequent* to the breakdown, when the machine had been stopped and the temperature had risen. (See Paul, Record, p. 190, Shinn, p. 193.)

3. The breakdown was two or three hours after sailing, not one hour as stated in the petition. (Opinion of McPherson, J. Record, 209.)

4. The petitioners' own expert witnesses admit that the breakdown might have occurred without any negligence or want of proper care on the part of those in charge of the machinery. Roelker (Record, 33), Rossi (R. 44, 46), Fleming (R. 66), Cross (R. 92), Young, (R. 97). While we have the direct evidence of the ship's engineers that everything that could be done was done to put and keep the refrigerating machinery in proper and efficient order prior to the departure of the vessel from the dock. (Paul, R. 190; Shinn, R. 202.)

VIII.

The writ of *certiorari* should be refused.

J. RODMAN PAUL
for S. S. Southwark.

BIDDLE & WARD
of Counsel